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Sixth Amendment - Confrontation Clause

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SIXTH AMENDMENT—CONFRONTATION CLAUSE—The United States Supreme Court held in a 6 - 3 decision, that a criminal defendant suffered no confrontation clause violation when excluded from the in-chambers competency hearing of two minor witnesses.

Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

In *Kentucky v. Stincer*,[1] the United States Supreme Court addressed the question of whether a criminal defendant's sixth amendment[2] rights under the confrontation clause[3] were violated when Stincer was denied access to an in-chambers competency hearing of two minors who were key witnesses for the prosecution in a sexual assault case.[4] Sergio Stincer was indicted in the Circuit Court of Christian County, Kentucky and charged with committing first degree sodomy.[5] The alleged victims were two girls under the age of twelve,[6] both of whom represented key witnesses in the prosecution's case. After a jury was sworn, an in-chambers competency hearing was held as a prelude to the presentation of evidence.[7] Stincer, over his strong objection, was excluded from this proceeding, although the public defender representing him was allowed to participate.[8]

The judge, prosecutor, and Stincer's counsel examined each child witness seperately to determine their competency to testify.[9] Ques-

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1. Kentucky v. Stincer, 107 S. Ct. 2658 (1987).
2. U.S. CONST. amend. VI.
3. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*
4. *Stincer*, 107 S. Ct. at 2660.
5. *See* KY. REV. STAT. § 510.-070 (1985) In Kentucky, a person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person who is incapable of consent because he is less than twelve years old.
6. *Stincer,* 107 S. Ct. at 2660.
7. *Id.* A determination of the two girls competency to testify was necessary because of their young age.
8. *Id.* The trial judge elected to exclude Respondent *sua sponte* and the public defender only raised objections after prompting by his client. *Id.* at 2670 (Marshall, J., dissenting).
9. *Id.* The questions raised were to determine whether the girls could remember facts and distinguish between the truth and lying. *Id.* One of the girls responded "she would 'get a whopping' if she told a lie." *Id.* at 2660 n.3.

tioning was limited to determining the children's competency and never touched upon the substance of their anticipated testimony at trial.[10] The trial judge found the girls competent to testify and the public defender raised no objections.[11]

In open court before the jury and Stincer, the prosecutor and defense counsel again challenged the girls competency to testify by asking them questions similiar to those raised at the earlier hearing when Stincer was not present.[12] Stincer was convicted by the jury of first degree sodomy for having deviate sexual intercourse[13] with the children and was sentenced to twenty years in prison.[14]

Stincer appealed, and the Supreme Court of Kentucky reversed the trial court decision,[15] finding that Respondent's right to face his accusers under the confrontation clause and section 11 of the Bill of Rights of the Kentucky Constitution[16] extended to the competency hearing. The Kentucky high court reasoned that if Stincer had attended the competency hearing, his assistance of the defense counsel in questioning the children could have resulted in a successful challenge of their competency and thereby altered the outcome of the trial.[17] The United States Supreme Court granted certiorari[18] to determine whether the Kentucky Supreme Court erred in holding that the confrontation clause of the sixth amendment or the due process

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10. *Id.* at 2660.

11. *Id.*

12. *Id.* at 2661. After the young witnesses completed their testimony, the public defender elected not to request the trial court to reconsider the competency of the girls to testify. *Id.*

13. *Id.* Deviate sexual intercourse is definded as "any act of sexual gratification between persons not married to each other involving sex organs of one person and the mouth or anus of another". KY. REV. STAT. § 510.010(1).

14. *Stincer*, 107 S. Ct. at 2661.

15. Stincer v. Commonwealth, 712 S.W.2d 939, 940 (Ky. 1986).

16. The Kentucky Constitution provides that "in all criminal prosecutions the accused has the right . . . to meet the witnesses face to face." Ky. Bill of Rights, § 11.

17. *Stincer*, 712 S.W.2d at 941. Two concurring Justices stipulated that the opinion should mandate that competency hearings take place in the open court with the jury present. In this manner, not only would a defendent's confrontation rights be ensured, but also a jury could evaluate the credibility of a child witness. Also, this procedure would eliminate any temptation to raise substantive testimony at an in-chambers hearing where the criminal defendant is not present. *Id.* at 942. Two dissenting Justices distinguished confrontation from cross-examination, arguing that the former only entitled Stincer to utilize the latter as a method for presenting evidence to the jury at trial. *Id.* at 942-43.

18. Kentucky v. Stincer, 107 S. Ct. 642 (1986).

clause of the fourteenth amendment[19] were violated when Stincer was denied an opportunity to participate in an in-chambers competency hearing.[20]

The United States Supreme Court, in a 6-3 decision, reversed the Kentucky Supreme Court.[21] Justice Blackmun, delivering the majority opinion,[22] first addressed the sixth amendment issue.[23] The Court acknowledged that the confrontation clause provides the criminal defendant with the right of cross-examination[24] in a state trial,[25] but found that Stincer's exclusion from the competency hearing did not interfere with his right to effective cross-examination.[26]

In reaching his conclusion, Justice Blackmun stressed the critical importance of cross-examination in discovering the truth at trial,[27] and concluded that the confrontation clause represents a "functional" right.[28] Justice Blackmun outlined two broad categories of cases that addressed a criminal defendant's functional right under the confrontation clause.[29] The first set of cases concerned the admissibility of out-of-court statements,[30] while the second group of cases dealt with restrictions on the scope of cross-examination imposed by either written law or the trial court.[31] Justice Blackmun recognized that not

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19. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

20. *Stincer,* 107 S. Ct. at 2662.

21. Justice Blackmun was joined by Chief Justice Rehnquist, and Justices White, Powell, O'Connor, and Scalia. Justice Marshall dissented, joined by Justices Brennan and Stevens. *Id.* at 2660.

22. *Id.*

23. *See supra* notes 2-4 and accompanying text.

24. *Stincer,* 107 S. Ct. at 2662, *citing* Douglas v. Alabama, 380 U.S. 415, 418 (1965).

25. *Stincer,* 107 S. Ct. at 2662, *citing* Pointer v. Texas, 380 U.S. 400 (1965).

26. *Stincer,* 107 S. Ct. at 2666.

27. *Id.* at 2662. *See* Davis v. Alaska, 415 U.S. 308, 316 (1974). *See also* California v. Green, 399 U.S. 149, 158 (1970), *quoting* 5 J. WIGMORE ON EVIDENCE § 1367, p.29 (3d ed. 1940).

28. *Stincer,* 107 S. Ct. at 2662.

29. *Id.* at 2662-63.

30. *Id.* at 2663. Justice Blackmun referred to Ohio v. Roberts, 448 U.S. 56, 65-66 (1980), where the Court held that the statements of an unavailable witness were admissible at trial because the witness had been subject to full cross-examination at a preliminary hearing, as an example of when out-of-court statements could be admitted at trial in a manner consistent with the confrontation clause.

31. *Stincer,* 107 S. Ct. at 2663. Justice Blackmun cited Davis v. Alaska, 415 U.S. 308 (1974), where the Court held that the confrontation clause was violated when a state confidentiality provision denied the defense counsel an opportunity to question a witness about his juvenile criminal record, as an example of a law or trial court ruling that restricted a criminal defendant's opportunity for cross-examination.

all confrontation clause claims would arise under one of the two categories,[32] and cautioned that the limit of cross-examination category provided only a functional right equivalent to an *opportunity* for effective cross-examination.[33]

After establishing these distinctions, the majority opinion directly addressed whether excluding Stincer from the competency hearing denied him a constitutionally protected opportunity for effective cross-examination under the sixth amendment.[34] Justice Blackmun considered that after the child witnesses were found competent to testify, no legal barrier prevented Stincer from challenging the girls' competency in open court.[35] Stincer availed himself of this functional right when his counsel presented questions at trial to the minors similiar in nature to those utilized in the competency hearing.[36] The majority opinion concluded that because the same questions asked at the competency hearing could be repeated at trial with Stincer present to aid his counsel, he received an opportunity for effective cross-examination of the witnesses under the confrontation clause.[37]

The Court reviewed the case law of Kentucky and other states in regard to a judge's authority to determine competency and the standards he should apply in deciding whether a child should testify.[38] Kentucky utilizes a well established criteria for determining child competency[39] and the line of questioning rarely touches upon the

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32. *Stincer*, 107 S. Ct. at 2664. Justice Blackmun cited Delaware v. Fensterer, 474 U.S. 15 (1985) (*per curiam*), where an expert witness for the prosecution who could not recall the basis for his testimony was subject to unfettered cross-examination, as an example of a case falling into neither the out-of-court statement nor the limit of cross-examination category of cases.

33. *Stincer*, 107 S. Ct. at 2664, *citing* Delaware v. Fensterer, 474 U.S. 15 (1985) (*per curiam*) where the Court stipulated that the confrontation clause guarantees the defendant only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 20 (emphasis in the original).

34. *Stincer*, 107 S. Ct. at 2664.

35. *Id.*

36. *Id.*

37. *Id. See* California v. Green, 399 U.S. at 159 (1970), where the Court stipulated that as long as the criminal defendant receives an opportunity to effectively cross-examine a witness at trial, the failure to question a witness when he made earlier statements cannot easily be shown to be of crucial significance.

38. *Stincer*, 107 S. Ct. at 2664-66.

39. *Id.* at 2665. *See* Moore v. Commonwealth, 384 S.W.2d 498, 500 (Ky. 1964) which established that the competency of a child witness depends upon whether the child can observe and recollect facts, narrate those facts to a judge or jury, and appreciate the moral sense of obligation to tell the truth.

substantive issues of the trial.[40] Also, in Kentucky the responsibility of determining a child's competency to testify rests with the trial judge.[41] Other states have established that a judge's duty continues throughout the trial,[42] and defense counsel may ask the judge to reconsider a child's competency after the child has testified.[43] Finding no inconsistency between the applicable case law and the trial judge's actions in ruling the girls competent to testify, Justice Blackmun concluded that Stincer's rights under the sixth amendment were not violated by his exclusion from the in-chambers competency hearing.[44]

Justice Blackmun next addressed Stincer's claim that his exclusion from the competency hearing violated his rights under the due process clause of the fourteenth amendment.[45] The Court acknowledged that the due process clause guarantees a defendant the right to be present at every critical stage of a criminal proceeding where his absence would detract from the trial's fairness.[46] The majority once again emphasized that the competency hearing was limited to general competency oriented questions[47] that never touched upon the young witnesses' substantive testimony, declining to indicate what its posi-

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40. *Stincer*, 107 S. Ct. at 2665. Questions asked of the children normally included their name, age, where they attended school, whether they could tell the truth, and understand the consequences of telling a lie.

41. *Id. See* Whitehead v. Stith, 268 Ky. 703, 709, 105 S.W.2d 834, 837 (1937), which stipulated that the competency of a witness to testify rests with the judge, not the jury.

42. *Stincer*, 107 S. Ct. at 2666. *See, e.g.*, Litzkuhn v. Clark, 85 Ariz. 355, 360, 339 P.2d 389, 392 (1959), which found that the judge who has permitted a child witness to testify possesses a duty to reverse himself upon due cause and remove the child from the stand and instruct the jury to disregard the testimony. *See also* Davis v. Weber, 93 Ariz. 312, 317, 380 P.2d 608, 611 (1963), which reaffirmed a trial judge's right to change his mind regarding a child's competency.

43. *Stincer*, 107 S. Ct. at 2666. *See, e.g., In re* R.R., 79 N.J. 97, 106, 398 A.2d 76, 80 (1979) where defense counsel moved to have a 4-year old boy declared incompetent after completion of the prosecutor's questioning.

44. *Stincer*, 107 S. Ct. at 2666.

45. *Id.* at 2667. *See supra* note 19 for the relevant portion of the fourteenth amendment.

46. *Stincer*, 107 S. Ct. at 2667. The majority cited Snyder v. Massachusetts, 291 U.S. 97 (1934), where the Court recognized not only a defendant's due process right to personally defend against all charges but also the importance of this right toward providing a just and fair hearing; the due process clause, however, did not extend to instances where the defendant's presence would be of no use. *Id.* at 105-108.

47. *Stincer*, 107 S. Ct. at 2667. The competency hearing questions were directed toward determining the child's ability to recall and articulate facts, distinguish between truth and falsehood, and recognize a moral obligation to tell the truth.

tion would be had the competency hearing participants been exposed to such testimony.[48] The Court noted that the record contained no indication that Stincer's presence at the in-chambers hearing would have altered the judge's finding of competency[49] and concluded that his exclusion from the hearing did not violate his rights under the due process clause of the fourteenth amendment.[50]

Justice Marshall filed a dissenting opinion[51] in which he described the competency hearing as a critical stage of trial protected by both the sixth and fourteenth amendments.[52] The dissent first addressed the confrontation clause and interpreted it as requiring witnesses to testify against a defendant "*in his presence*".[53] Justice Marshall determined that the majority had narrowed the confrontation clause's application to "*exclusively*" deal with the right to cross-examination.[54] This interpretation then justified the exclusion of Stincer from a crucial stage of the trial, the competency hearing.[55]

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48. *Id.*

49. *Id.* at 2668. Justice Blackman pointed out that Stincer presented no evidence that his personal knowledge of the children or their backgrounds could have aided his counsel or the judge in their questioning on the young witnesses' competency.

50. *Id. See* United States v. Gagnon, 470 U.S. 522, 527 (1985) (*per curiam*). There, a United States District Court judge in a criminal trial interviewed a juror, *in camera*, about whether he was prejudiced against a defendant who had been drawing sketches of the jury. The defense counsel attended the *in camera* meeting which the defendant neither asked to attend nor objected to when excluded. The Supreme Court found that defendant's exclusion from the *in camera* discussion threatened neither his opportunity to defend against the charges nor the fundamental fairness of the trial. *Id.* at 527. Therefore, the court held that the defendant's due process right was not violated by his exclusion from the *in camera* meeting. *Id.* at 526.

51. *Stincer*, 107 S. Ct. at 2668. Justice Marshall was joined in his dissent by Justices Brennan and Stevens.

52. *Id.* Justice Marshall interpreted the majority's opinion as limiting a defendant's rights under the confrontation clause to cross-examine witnesses *at some point* during the trial. (emphasis in original). Justice Marshall also recognized that the due process clause issue had not been addressed by the lower courts and was not properly before the court; if it was, however, he would again dissent.

53. *Id.* at 2669 (emphasis in original).

54. *Id.* (emphasis in original). Justice Marshall concluded that once the majority limited the confrontation clause to providing an opportunity for cross-examination in the court room, the court could easily find that Stincer's rights were not violated at the in-chambers hearing since cross-examination was available to him at a later time in the trial.

55. *Id.* Justice Marshall cited with approval the Kentucky Supreme Court's holding in Stincer v. Commonwealth, 712 S.W.2d at 940, that the competency hearing represented a "crucial phase of the trial."

The dissent acknowledged that the Court had explored the confrontation clause's parameters on prior occasions.[56] However, for the first time the Court was substituting a subsequent opportunity to cross-examine a witness at trial for the right to confront the witness at an earlier proceeding.[57] Justice Marshall contended that the confrontation clause protects more than the right to cross-examination.[58] The sixth amendment extends beyond physically confronting the witnesses,[59] and by implication encompasses the right to physical presence at every testimonial proceeding.[60]

In determining the competency of a child witness to testify, Justice Marshall argued that the criminal defendant's physical presence would enhance the fact-finder's decision making process, which under Kentucky law rests with the trial judge.[61] While a defendant's counsel could assist the judge in determining a witness' competency at an in-chambers hearing, the defendant's personal knowledge of the witness could more effectively bring inaccuracies in the witness' answers to the judge's attention.[62] The dissent also contended that confrontation should occur *before* the witness testified in front of a jury in open court with the trial judge's *imprimatur* of competency.[63]

In addition to finding a reduction in the reliability of the competency hearing, Justice Marshall claimed the majority opinion undermined in several respects the confrontation clause's "symbolic" goal of fairness.[64] First, the trial judge raised the issue of Stincer's

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56. *Stincer*, 107 S. Ct. at 2669. Justice Marshall argued that the majority's categorial analysis of Ohio v. Roberts, 448 U.S. 56 (1980), California v. Green, 399 U.S. 149 (1970), and Davis v. Alaska, 415 U.S. 308 (1974) was largely beside the point since in those cases no question existed about the defendant's right to be present during testimony.

57. *Id.*

58. *Id.* The right to cross-examination is "included in" the broader right of the defendant to confront the witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965). *See* California v. Green, 399 U.S. at 157. *See also* Ohio v. Roberts 448 U.S. at 63 nn.5-6.

59. *Stincer*, 107 S. Ct. at 2669, *citing* Davis v. Alaska, 415 U.S. at 315.

60. *Stincer*, 107 S. Ct. at 2669.

61. *Id. See supra* note 35 and accompanying text.

62. *Stincer*, 107 S. Ct. at 2669-70. Justice Marshall found that attributing to the defense counsel all relevant facts necessary for a trial court determination of competency to be "functionally inefficient and fundamentally unfair". *Id.* at 2670.

63. *Id.* at 2669-70 (emphasis in original).

64. *Id.* at 2670. The dissent referred to Lee v. Illinois, 106 S. Ct. 2056 (1986), where the court remarked that the constitutional right to confrontation contributes to not only the reality, but also the perception of fairness in the criminal justice system. *Id.* at 2062.

exclusion from the in-chambers competency hearing without any prompting by the Commonwealth.[65] Second, the court-appointed defense attorney raised no objection to his client's exclusion until after Stincer personally protested.[66] Finally, no reason for excluding Stincer was given by either the trial judge or the prosecuting attorney.[67] Justice Marshall concluded that Stincer's exclusion was not only unrequested and unjustified, but more importantly it subverted the confrontation clause's symbolic function of fairness.[68]

Justice Marshall also raised the question of whether the majority's opinion would force a criminal defendant to select between two constitutionally protected rights.[69] If a criminal defendant exercised his sixth amendment right of self-representation he would undoubtedly have been permitted to attend the competency hearing.[70] Thus, a criminal defendant could foreseeably face the dilemma of choosing between either having assistance of counsel and being excluded from the competency hearing, or appearing *pro se* in order to attend this important stage of trial.[71] Indicating that a defendant should not be forced to select between two fundamental rights,[72] Justice Marshall criticized the Court for neglecting to address whether requiring a defendant to make such a choice was constitutionally defensible.[73]

Addressing Stincer's fourteenth amendment due process claim, Justice Marshall considered whether a criminal defendant had a right to attend *any* portion of the trial where his presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."[74] Justice Marshall agreed with the Court that

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65. *Stincer*, 107 S. Ct. at 2670. "The trial judge raised this issue *sua sponte*. . . ."

66. *Id.* at 2670 n.1. "Only the personal protestations of [Stincer], a recent Cuban immigrant whose fluency in the English language was limited, preserved the issue for appeal." *Id.* at 2670.

67. *Id.*

68. *Id.* at 2671. Justice Marshall sympathized with the concerns a criminal defendant might have about the judge, prosecutor, and court appointed attorney conferring behind closed doors with the prosecution's key witnesses. *Id.* at 2670-71.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*, *citing* Simmons v. United States, 390 U.S. 377, 394 (1968), where the Court held a defendant's testimony to suppress evidence under the fourth amendment could not be used to establish his guilt in violation of the fifth amendment.

73. *Stincer*, 107 S. Ct. at 2671.

74. *Id.* (emphasis in original), *citing* Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).

the competency hearing had a reasonably substantial relation toward determining Stincer's guilt, but disputed the majority's decision to dismiss the due process argument after determining Stincer's exclusion caused no harm.[75] This approach inappropriately shifted the issue from whether a due process violation occurred to whether the violation was harmless and unfairly placed the burden on the defendant to establish harm resulting from the constitutional deprivation.[76] Concluding his dissent, Justice Marshall argued that the due process clause does not raise a presumption that a trial judge acts harmlessly when excluding a criminal defendant from a critical stage of trial, namely the competency hearing of the prosecution's key witnesses.[77]

The criminal defendant's right to confront adverse witnesses and cross-examine them dates back to the beginning of American jurisprudence.[78] A primary motivation for cross-examination centered on the need to protect a criminal defendant against witnesses possessing faded memories or dishonorable motivations by providing the accused with an opportunity to prove the State's accusations untrue.[79] The primary method for confronting the witness was cross-examination.[80] Another rationale supporting confrontation was that it improved the fact finding process by compelling a witness "to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief".[81]

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75. *Stincer*, 107 S. Ct. at 2671-72. Justice Marshall stated that the Court had determined Stincer's attendence at the in-chambers hearing would not have improved the reliability of the competency proceeding. *Id.* at 2672.

76. *Id.* Justice Marshall considered United States v. Gagnon, 470 U.S. 522 (1985) (*per curiam*), to be an inadequate foundation for the court to place the burden of establishing harm on the criminal defendent.

77. *Stincer*, 107 S. Ct. at 2672.

78. 5 WIGMORE, EVIDENCE § 1367 (Charbourn rev. 1974). "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."

79. Greene v. McElroy, 360 U.S. 474, 496 (1958). Chief Justice Warren stated that "We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against them'". *Id.* at 496.

80. Pointer v. Texas, 380 U.S. 400, 404-05 (1965). "It cannot seriously be doubted . . . that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing truth in the trial of a criminal case." *Id.* at 404. Cross-examination represents the "greatest legal engine ever invented for the discovery of truth." 5 WIGMORE EVIDENCE § 1367.

81. Mattox v. United States, 156 U.S. 237, 242-43 (1895). In Mattox, the

The Supreme Court in *Snyder v. Massachusetts*,[82] although addressing a due process claim, set the parameters by which more recent courts would determine whether a criminal defendant could complain under the confrontation clause about exclusion from a trial proceeding. In *Synder*, Justice Cardozo established that "[s]o far as the fourteenth amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[83] Justice Cardozo stipulated that a criminal defendant had a right to confront witnesses only when the defendant's presence had a reasonably substantial relation to his opportunity to defend himself.[84] Consequently, the defendant had no privilege to be present when "presence would be useless, or the benefit but a shadow".[85] On the other hand, Justice Cardozo did find that the "stages of the trial when there are witnesses to be questioned" was within the limits on the privilege of confrontation.[86]

The United States Supreme Court first made the sixth amendment right to confront a witness applicable to the states through the fourteenth amendment in *Pointer v. Texas*.[87] In subsequent years, the Court established that its confrontation clause cases fall into two broad,[88] but nonexclusive[89] categories. The first category of cases

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Court held that a transcribed copy of the testimony of two witnesses from an initial murder trial who had since died could be admitted as evidence at a subsequent trial and could not be impeached. Mr. Justice Brown, writing for the majority, reasoned that although the defendant could not confront his accusers at the second trial, he had a full opportunity at the first trial to cross-examine the witnesses and attempt to impeach their testimony.

82. Snyder v. Massachusets, 291 U.S. 97 (1934). In Snyder, a criminal defendant charged with murder was excluded from accompanying the defense attorney, jury, judge, and prosecutor on their viewing of the scene of the crime. The Court held that defendent's right to due process under the fourteenth amendment were not violated by his absence from the viewing.

83. *Id.* at 107-08.

84. *Id.* at 105-06.

85. *Id.* at 106-07.

86. *Id.* at 107.

87. Pointer v. Texas, 380 U.S. 400 (1965). The state court admitted as evidence at trial a transcript of a witness's testimony from a preliminary hearing where the criminal defendant did not have counsel. The Supreme Court found that since the witness failed to appear at trial the criminal defendant's rights were violated under the confrontation clause. "We hold today that the sixth amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the states by the fourteenth amendment." *Id.* at 403.

88. Delaware v. Fensterer, 474 U.S. at 18 (*per curiam*). *See also Stincer*, 107 S. Ct. at 2663.

89. Delaware v. Fensterer, 474 U.S. at 18-19 (*per curiam*).

addresses situations where out-of-court statements had been admitted as substantive evidence under one of the numerous exceptions to the hearsay rule.[90] The second set of cases deals with limitations on the cross-examination of a witness at trial imposed either by the law or by the court.[91] However, in some instances the Supreme Court could not neatly fit a case into either the first or the second category.[92]

The first line of confrontation clause cases concerns whether the admission at trial of "out-of-court statements" as substantive evidence under an exception to the hearsay rule violated the criminal defendant's right to confront (cross-examine) the declarant of the hearsay statement. For example, in *Barber v. Page*[93] the Supreme Court held that a trial court violated a criminal defendant's right to confrontation by admitting as substantive evidence a declarant's preliminary hearing testimony, when it was not subject to cross-examination, and the prosecutor had failed to make a good faith effort to present the declarant as a witness at trial.[94] The Supreme Court maintained a consistent position in *California v. Green*,[95] holding that when a witness appeared to testify in a state court trial and was subject to cross-examination, the preliminary hearing testimony of the witness could be used as evidence without violating the sixth amendment.[96] Thus, the Court established that "[w]hen a wit-

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90. *Id.* For cases that exemplify this catagory, *see* Barber v. Page, 390 U.S. 719 (1968), California v. Green, 399 U.S. 149 (1970), and Ohio v. Roberts, 448 U.S. 56 (1980). *See also*, Tennessee v. Street, 471 U.S. 409 (1985) and Lee v. Illinois, 106 S. Ct. 2056 (1986).

91. Delaware v. Fensterer, 106 S. Ct. at 294. For the case best exemplifying this category, *see* Davis v. Alaska, 415 U.S. 308 (1974). *See also* Delaware v. VanArsdall, 106 S. Ct. 1431 (1986) and Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987).

92. Delaware v. Fensterer, 106 S. Ct. at 294. This decision represents a case that falls into neither the "out-of-court statement" nor the "limit of cross-examination" category. *Id.*

93. Barber v. Page, 390 U.S. 719, 724-25 (1968).

94. *Id.* at 724-25. Justice Marshall, writing for the majority, stipulated that even if the declarant had been cross-examined at the preliminary hearing, without a good faith effort to present him at trial, the court would have reached the same result. "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 725.

95. California v. Green, 399 U.S. 149 (1970).

96. *Id.* at 158. In *Green*, a witness' statements from a preliminary hearing were inconsistent with his later trial testimony in state court, but were admitted as substantive evidence under an exception to the hearsay rule. *Id.* at 151-52. The court, per Justice White, determined that while out-of-court statements are neither under oath nor subject to cross-examination nor observed by a jury, as long as the

ness is available to testify in court, his prior statement, even if reliable, generally will be inadmissible to prove the truth of what it asserts unless the witness is produced for cross-examination."[97]

The Supreme Court established the present day test in *Ohio v. Roberts*[98] for evaluating whether a confrontation clause violation occurred in the "out-of-court statement" category of cases. In *Roberts*, the Court held that the admission of a declarant's preliminary hearing statement as substantive evidence was permissible under the sixth amendment when the hearsay statement was subject to cross-examination[99] and the declarant was legitimately unavailable for trial.[100] The first part of the test for determining the admissibility of hearsay statements requires the prosecution to either produce the declarant of the out-of-court statement for trial or demonstrate his unavailability.[101] Once unavailability has been established, the second prong of the test only permits the admission of prior testimony when it bears some "indicia of reliability".[102] The principle method for producing reliable evidence requires that a declarant's statements be subject to cross-examination, both as a matter of form and purpose.[103]

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declarant appears as a witness subject to cross-examination at trial these protections of the confrontation clause are essentially restored. *Id.* In addition, Justice White reasoned that a defendant's inability to cross-examine a witness' statements made outside of court cannot easily be considered of crucial significance when the defendant may fully cross-examine the witness at trial. *Id.* at 159. The Court also noted that the preliminary hearing statements of the witness were admissible, apart from whether the defendant confronted the witness at the subsequent trial, since the defendant received a full opportunity to confront the witness at the preliminary hearing. *Id.* at 165.

97. Lee v. Illinois, 106 S. Ct. 2056, 2066 (1986) (Justice Blackmun dissenting). In *Lee*, the state court convicted the petitioner of two murders using a codefendant's confession as substantive evidence, although the codefendant did not testify at trial and was not subject to cross-examination (under the fifth amendment privilege against self-incrimination). *Id.* at 2060-61. The Court, per Justice Brennan, held that the codefendant's confession accusing the petitioner was inherently unreliable as hearsay evidence and any conviction based upon such evidence not subject to cross-examination at trial violated the petitioner's constitutional right to confrontation. *Id.* at 2065.

98. Ohio v. Roberts, 448 U.S. 56 (1980).

99. *Roberts*, 448 U.S. at 73, *citing* Mancusi v. Stubbs, 408 U.S. 204, 216 (1972).

100. *Roberts*, 448 U.S. at 75.

101. *Id.* at 65.

102. *Id.* at 65-66, *citing* Mancusi v. Stubbs, 408 U.S. at 213.

103. *Roberts*, 448 U.S. at 70-71. A defense counsel's questioning assumes the "form" of cross-examination where leading questions are utilized. Counsel's inquiries comform to the "purpose" of cross-examination when the questions challenge whether the declarant was telling the truth and accurately perceived the matter at issue.

Thus, under the *Roberts* test, only when the declarant is unavailable for trial *and* the statement contains some "indicia of reliability" may the out-of-court statement be admitted without undermining the confrontation clause.[104]

The application of the *Roberts* analysis to the "out-of-court statement" category of confrontation clause cases was most extensively applied in *Lee v. Illinois*,[105] where both the majority and dissenting opinions utilized the *Roberts* test, although they reached opposite conclusions.[106] At trial, Lee was convicted of two murders on the strength of her codefendant's confession, although neither defendant testified.[107] The majority applied the "indicia of reliability" prong of the *Roberts* test to determine whether the facts rebutted the presumption that a codefendant's confession was unreliable.[108] Justice Brennan, writing for the majority, recognized that the codefendant's confession was neither subject to cross-examination nor consistent with Lee's confession on several important points.[109] Therefore, the majority concluded that the codefendant's confession did not bear some "indicia of reliability" and held that its admission as substantive evidence at trial violated Lee's rights under the confrontation clause.[110]

The dissenting Justices in *Lee* also applied the *Roberts* test, but their analysis led to a different conclusion.[111] Under the first part of the test, Justice Blackmun, speaking for the dissenters, determined that the codefendant was essentially unavailable as a witness because if called to testify he would have invoked his fifth amendment privilege against self-incrimination.[112] Applying the second prong of

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104. Lee v. Illinois, 106 S. Ct. at 2066 (emphasis added).

105. Lee v. Illinois, 106 S. Ct. 2056 (1986).

106. The majority opinion was delivered by Justice Brennan who was joined by Justices White, Marshall, Stevens, and O'Connor. *Id.* at 2057. The dissenting opinion was written by Justice Blackmun and joined by Chief Justice Burger and Justices Powell and Rehnquist. *Id.* at 2066.

107. *Id.* at 2057.

108. *Id.* at 2063. Justice Brennan noted that the confrontation clause not only helps achieve the symbolic goals of creating in the criminal justice system the perception as well as the reality of fairness, but also creates the functional right of cross-examination which promotes reliability in criminal trials. *Id.* at 2062.

109. *Id.* at 2064.

110. *Id.* at 2065. Justice Brennan found that the co-defendant's confession fell short of satisfying the admissibility standard of the confrontation clause which "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule'" (that hearsay evidence is inadmissible). *Id.* at 2064, *citing* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

111. *Lee*, 106 S. Ct. at 2066.

112. *Id.* at 2067.

the test, the dissent concluded, in contrast to the majority, that the co-defendant's confession did possess some "indicia of reliability".[113] Justice Blackmun reasoned that while the majority could presume the confession was inaccurate, because it did not shift blame away from the codefendant to Lee, the out-of-court statement appeared reliable.[114] Justice Blackmun also noted that Lee and codefendant's confessions were strikingly similiar in detail and this consistency added credibility to the codefendant's hearsay statement.[115] Therefore, the dissent found that both parts of the *Roberts* test were satisfied and admission of the codefendant's confession as substantive evidence did not violate Lee's rights under the confrontation clause.[116]

The second line of confrontation clause cases addresses whether a criminal defendant's sixth amendment rights are violated when either the law or the courts impose restrictions on cross-examination at trial. The paramount case in the cross-examination category is *Davis v. Alaska*.[117] There, the trial court prohibited the defense counsel from questioning the prosecution's key witness, a minor, about his being on probation by order of a juvenile court.[118] The Supreme Court, speaking through Chief Justice Burger, recognized that the State possessed an interest in protecting a child's anonymity as a juvenile offender, but found that this interest was outweighed by the criminal defendant's constitutional right to confrontation.[119] The Court concluded that without the right to effective cross-examination, the defense counsel was denied an opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness".[120]

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113. *Id.* at 2068. Justice Blackmun noted that the Court has never established a *per se* inadmissibility rule against the confessions of a codefendant and cited Bruton v. United States, 391 U.S. 123 (1968), as an example of a case where the admissibility of a co-defendant's confession was not challenged. *Lee*, 106 S. Ct. at 2068 n.5.

114. *Id.* at 2069.

115. *Id.* Justice Blackmun pointed out that the codefendant's confession was less favorable to him than Lee's version of the murders. In addition, the codefendant's statements failed to reduce his own complicity in the crimes.

116. *Id.* at 2071.

117. Davis v. Alaska, 415 U.S. 308, 319 (1974).

118. *Id.* at 310-11.

119. *Id.* at 319. Chief Justice Burger made it clear that confrontation "means more than being allowed to confront the witness physically." *Id.* at 315. The Court also stated that "the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" *Id.* at 315-16, *citing* 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940) (emphasis in original).

120. *Id.* at 318.

The issue of limitations on cross-examination was recently addressed by the United States Supreme Court in *Delaware v. Van Arsdall*.[121] There, the trial judge prohibited the criminal defendant's counsel from pursuing a line of questioning aimed at establishing bias in a prosecution witness that had drunk-driving charges against him dropped after agreeing to cooperate with the prosecutor and testify.[122] Justice Rehnquist, writing for the Court, reasoned that the trial judge's decision prevented the jury from reasonably drawing inferences about the credibility of the witness' testimony.[123] Noting that "the trial court prohibited *all* inquiry into the possibility that [the witness] would be biased,"[124] the Supreme Court concluded that the criminal defendant's rights were violated under the confrontation clause.[125]

After finding a violation of the confrontation clause in *Van Arsdall*, the Supreme Court considered whether the Delaware Supreme Court was correct in refusing to apply the *Chapman* harmless-error analysis[126] to the case.[127] Justice Rehnquist recognized that constitutional errors which touch upon a criminal defendant's fundamental rights require automatic reversal of a conviction, but determined that a restriction at trial on cross-examination of an adverse witness did

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121. Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986).

122. *Id.* at 1434.

123. *Id.* at 1436.

124. *Id.* at 1435 (emphasis in original).

125. *Id.* "We think that a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . [the criminal defendant in this case] has met that burden here." *Id.* at 1436.

126. Chapman v. California, 386 U.S. 18 (1967) requires that an otherwise valid conviction be upheld where the party found in error can establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Van Arsdall*, 106 S. Ct. at 1436, *citing* Chapman v. California, 386 U.S. at 24. In other words, the *Chapman* Court determined that certain constitutional errors at trial may have a "harmless" effect on the fact finding process and in these instances a court of appeals should not set aside an otherwise valid conviction. *Van Arsdall*, 106 S. Ct. at 1436.

127. *Van Arsdall*, 106 S. Ct. at 1436-37. The *Chapman* harmless-error analysis had previously been applied to the "out-of-court statement" category of confrontation clause cases. *See* Harrington v. California, 395 U.S. 250 (1969) where the Supreme Court found that the admission of a nontestifying codefendant's statement as evidence in a criminal defendant's trial was harmless beyond a reasonable doubt. *See also* Brown v. United States, 411 U.S. 223 (1973) where Chief Justice Burger stated for a unanimous Court that "[w]e reject the notion that a Burton (admission of a hearsay statement) error can never be harmless." *Id.* at 231.

not fall into the *per se* reversal category.[128] Thus, the Supreme Court held that an unconstitutional restriction on the right of cross-examination imposed by either the law or the court was subject to the *Chapman* harmless-error analysis.[129] The Court therefore vacated the Delaware Supreme Court's judgment and remanded to the lower court to determine "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt".[130]

The issue of whether a confrontation clause violation occurred in the "limit on cross-examination" category was also closely scrutinized by the United States Supreme Court in *Pennsylvania v. Ritchie*.[131] There, a criminal defendant convicted of sexually abusing his daughter was denied pre-trial discovery access to the records of a state child abuse protective service agency which claimed that its files were privileged under a Pennsylvania confidentiality statute.[132] Although the trial court did not limit the criminal defendant's cross-examination of his daughter, the chief prosecution witness, the criminal defendant argued on appeal that without access to the state agency documents he was hampered in his ability to cross-examine his daughter and thus denied his sixth amendment right to confrontation and compulsory process.[133] Utilizing a due process analysis of the compulsory process claim,[134] a bare majority of the Justices[135] voted to remand

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128. *Van Arsdall*, 106 S. Ct. at 1437. Examples of constitutional errors requiring automatic reversal include denying a criminal defendant assistance of counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963), and placing a criminal defendant before a fact finder with a financial interest in the trial's outcome, Tumey v. Ohio, 273 U.S. 510 (1927).

129. *Van Arsdall*, 106 S. Ct. at 1438. Justice White concurred in the judgment as to the application of the *Chapman* analysis, but would not find a sixth amendment violation unless the limitation on cross-examination changed the outcome of the trial. *Id.* at 1438-39.

130. *Id.* at 1438. The factors to be considered in a harmless-error analysis include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*, *citing* Harrington v. California, 395 U.S. at 254.

131. Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987).

132. *Id.* at 994.

133. *Id.* at 995.

134. *Id.* at 1001.

135. Justice Powell, author of the opinion, was joined by Chief Justice Rehnquist and Justices White, Blackmun, and O'Connor in his compulsory process/due process analysis. *Id.* at 994. Justice Stevens filed a dissenting opinion joined by

to the trial court for a harmless error evaluation of whether the criminal defendant's access to the state agency files would have changed the outcome of the trial.[136]

A plurality of Justices[137] in the *Ritchie* case also addressed whether the confrontation clause was violated when the trial court deprived the criminal defendant pre-trial discovery access to the state agency records.[138] Justice Powell, writing for the plurality, recognized the sixth amendment right to confrontation as basically a trial right[139] and noted that neither the trial court nor any statute restricted the criminal defendant's cross-examination of his daughter at trial.[140] Justice Powell stated that the opportunity to cross-examine an adverse witness did "not include the power to require the pre-trial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[141] The plurality held that the confrontation clause only applied to the actual trial stage and did not encompass the pretrial discovery of information.[142] Thus, the Court concluded that, in the criminal defendant's case, no violation of the confrontation clause occurred.[143]

Justice Blackmun, who joined the *Ritchie* Court in its compulsory/due process determinations but not its confrontation clause analysis, wrote a separate opinion to elaborate on his interpretation of a

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Justices Brennan, Marshall, and Scalia. *Id.* at 1009. The dissent argued that since the Court was one of limited jurisdiction it should dismiss the petitioner's writ because the judgment of the Pennsylvania Supreme Court below was not final. *Id.* at 1013.

136. *Id.* at 1002.

137. Justice Powell's confrontation clause analysis was joined by Chief Justice Rehnquist and Justices White and O'Connor; however, Justice Blackmun did not join this part of the opinion. *Id.* at 994.

138. *Id.* at 998.

139. *Id.* at 999, *citing* California v. Green, 399 U.S. at 157 and Barber v. Page, 390 U.S. at 725.

140. *Ritchie*, 107 S. Ct. at 1000.

141. *Id.* at 999.

142. *Id.* at 999 n.9. Justice Brennan filed a dissenting opinion, joined by Justice Marshall, in which he took strong exception to the plurality's narrow finding of the confrontation clause as only being applicable to events that occurred at trial. Justice Brennan argued that denying a criminal defendant access to information outside the trial creates a significant impediment on cross-examination at trial and thereby undercuts the protections of the confrontation clause. *Id.* at 1009. In the present case, Justice Brennan reasoned that denying the criminal defendant access to the state agency records undermined his efforts to impeach the witness at trial and therefore the dissent would have found a confrontation clause violation. *Id.* at 1006.

143. *Id.* at 1000.

criminal defendant's rights under the sixth amendment.[144] Justice Blackmun disagreed with the plurality's interpretation of the confrontation clause as having no relevance to pretrial discovery and in this respect was substantially in agreement with Justice Brennan's dissent.[145] Justice Blackmun contended that a confrontation clause analysis must look beyond the plurality's examination of whether cross-examination was limited at trial, to the deeper question of whether the criminal defendant had an opportunity at trial to effectively challenge the credibility and bias of an adverse witness.[146]

In questioning whether the purposes of cross-examination were satisfied under the confrontation clause, Justice Blackmun would apply his analysis to two different sub-categories of "limit on cross-examination" cases.[147] In the first sub-group, simple questioning of the witness at trial would provide the criminal defendant with an opportunity to effectively challenge the credibility of an adverse witness and undermine his testimony.[148] However, in the second sub-category, simple questioning fails to undermine a witness' testimony and may actually harm a criminal defendant by making his cross-examination appear, in the eyes of a fact finder, to be a baseless line of questioning against an apparently innocent witness.[149]

Justice Blackmun reasoned that the *Ritchie* case fell into the second sub-category of the "limit on cross-examination" line of confronta-

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144. *Id.* at 1004. Justice Blackmun concurred in part and concurred in the judgment.

145. *Id.*, *see supra* note 140 for the reasoning of Justice Brennan's dissenting opinion.

146. *Id.*

147. *Id.*

148. *Id.* at 1004-05. Justice Blackmun used Deleware v. Fensterer, 106 S. Ct. 292 (1985) (*per curiam*) as an example of the simple questioning line of cases. There, a criminal defendent's counsel's cross-examination, which was not limited by the judge or law, of an expert witness revealed that the expert could not remember the method of testing he used to reach the conclusions he testified to at trial. *Id.* at 293. Justice Blackmun reasoned that the simple questioning of the expert witness was sufficient to seriously undermine his credibility while continuing to protect the criminal defendent's confrontation right. *Ritchie,* 107 S. Ct. at 1004-05.

149. *Ritchie,* 107 S. Ct. at 1005. Justice Blackmun referred to Davis v. Alaska, 415 U.S. 308 (1974), as an example of a case in the second sub-category. There, the criminal defense attorney was permitted to question the key prosecution witness for bias, but under a state rule could not make reference to the witness' juvenile record. *Id.* at 310-11. Thus, simple questioning of the witness did not give the criminal defendent an opportunity to undermine the witness' credibility and actually gave the appearance that "defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Ritchie,* 107 S. Ct. at 1005, *citing* Davis v. Alaska, 415 U.S. at 318.

tion clause cases.[150] The defense counsel's simple questioning had no potential for establishing bias in the prosecution's key witness, the defendant's daughter, without access to the state agency files.[151] In addition, from the jury's perspective as fact-finder, the defense counsel's questions created the appearance that a blameless witness was being needlessly harassed.[152] Therefore, Justice Blackmun concluded that denial during pretrial discovery[153] of the state agency file hindered cross-examination at trial and would constitute a violation of a criminal defendant's right to confrontation.[154]

Although the Supreme Court generally placed confrontation clause claims into either the "out-of-court statements" or "limit on cross-examination" line of cases, the Court found neither category applied in *Delaware v. Fensterer*.[155] There, the testimony of an expert witness for the prosecution in a murder trial was admitted over defense counsel's objections that proper cross-examination was impossible because the witness could not recall the theory used to support his conclusions.[156] The Court stipulated the first category of confrontation clause cases failed to apply because the prosecutor made no attempt to introduce any out-of-court statements of the expert witness.[157] The *per curiam* opinion also reasoned the second line of sixth amendment cases was inapplicable since neither the trial court nor

150. *Ritchie*, 107 S. Ct. at 1005.

151. *Id.* Justice Blackmun drew a parallel with Davis v. Alaska, 415 U.S. 308 (1974), where defense counsel was also unable to establish bias with simple questioning because the juvenile record of the prosecution witness could not be utilized. *Ritchie,* 107 S. Ct. at 1005, *citing* Davis v. Alaska, 415 U.S. at 311 n.1.

152. *Ritchie*, 107 S. Ct. at 1005. Justice Blackmun also concluded that in *Davis* the inability of the defendant's attorney to refer to the witness' juvenile record created the impression in the jury's eyes of counsel annoying an unbiased witness.

153. *Id.* at 1006. Justice Blackmun acknowledged that in *Davis* the Court found the criminal defendant's confrontation right violated during the trial, while in *Ritchie* the constitutional infringement occurred during the pretrial stage. *Id.* at 1005-06. However, Justice Blackmun determined that the state can not "avoid confrontation clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage." *Id.* at 1006.

154. *Id.* Although Justice Blackmun's analysis indicated a confrontation clause violation existed, he concurred in the judgment to remand to the trial court, reasoning that the guidelines for an *in camera* examination of the files under Justice Powell's majority opinion were adequate to protect the criminal defendant's confrontation clause rights.

155. Delaware v. Fensterer, 106 S. Ct. 292 (1985) (*per curiam*).

156. *Id.* at 293.

157. *Id.* at 294.

state law limited the scope or nature of cross-examination of the prosecution's expert witness.[158]

The Supreme Court found in *Fensterer* that the defendant had an opportunity for effective cross-examination of the expert witness, although because of the memory lapse the defense counsel could not cross-examine to the extent he might wish.[159] The *per curiam* opinion admitted that a faulty memory impedes one approach to discrediting a witness; however, the Court reasoned that the forgetfulness opens an opportunity for the defense counsel to convince the fact-finder that the testimony of a witness unable to remember the basis for his conclusions deserves lesser weight.[160] Thus, the Court concluded that without either the admission of an out-of-court statement or limit on cross-examination, and with a full, unhindered opportunity to question the expert witness and challenge his credibility, the confrontation clause was not offended by admitting into evidence the testimony of a witness who failed to recall the basis for his testimony.[161]

The United States Supreme Court's approach to *Kentucky v. Stincer* presented the Justices with two basic issues. First, whether prior case law provided Stincer with a legitimate confrontation clause claim under either the "out-of-court statement,"[162] or "limit of cross-examination,"[163] category of cases or, possibly neither line of cases.[164] If precedent revealed that Stincer's case qualified for further analysis under one of the appropriate confrontation clause categories, the Supreme Court should then have considered the second issue of whether Stincer's sixth amendment rights were actually violated when he was excluded from an in-chambers competency hearing of two minor witnesses in a sexual assault case.[165]

Justice Blackmun's opinion outlined the "out-of-court statement" line of confrontation clause cases,[166] but failed to explicitly stipulate

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158. *Id.*

159. *Id.* at 295 (emphasis in original), *citing* Ohio v. Roberts, 448 U.S. 56, 73 (1980).

160. Delaware v. Fensterer, 106 S. Ct. at 294. "[T]he confrontation clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Id.* at 296.

161. *Id.*

162. *See supra* note 92 and accompanying text.

163. *See supra* note 93 and accompanying text.

164. *See supra* note 94 and accompanying text.

165. *Stincer*, 107 S. Ct. at 2660.

166. *Id.* at 2663.

whether this analysis was applicable to Stincer's case. Nevertheless, a careful reading of *Stincer* would reveal that the majority opinion never again referred to the "out-of-court statement" line of cases, raising an inference that the Court considered these cases inappropriate to resolving Stincer's claim.[167]

If Justice Blackmun had applied the test in *Ohio v. Roberts*,[168] he would have also reached the conclusion that the "out-of-court statement" line of confrontation clause cases would not benefit Stincer.[169] Specifically, the minor witnesses' statements from the in-chambers competency hearing were not admitted as substantive evidence at trial.[170] In addition, the minor witnesses appeared at trial and both the prosecutor and defense counsel subjected them to questioning aimed at challenging their competency.[171] Therefore, Justice Blackmun was justified in not exploring Stincer's claim of a confrontation clause violation under the "out-of-court statement" line of cases.[172]

The Supreme Court's discussion of whether Stincer could claim a sixth amendment violation placed much greater emphasis on the "limit on cross-examination" category of cases.[173] Although several Justices had previously determined that the right to confrontation was basically a trial right,[174] Justice Blackmun's opinion centered on whether a criminal defendant received an opportunity to effectively cross-examine a witness.[175] Stincer was denied access to the in-

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167. *Id.* at 2664.

168. *Roberts*, 448 U.S. at 65-66. Under the Roberts' test, hearsay comments may only be admitted as substantive evidence when the declarant either appears at trial or he is legitimately unavailable and his statements bear some indicia of reliability.

169. *See* Barber v. Page, 390 U.S. 719 (1968) and California v. Green, 399 U.S. 149 (1970).

170. *Stincer*, 107 S. Ct. at 2660.

171. *Id.* at 2661.

172. Justice Marshall's dissent contended that the "out-of-court statement" analysis could not be applied because it was based upon the presumption that the criminal defendant had a right to be present when the witness testified. *Id.* at 2669.

173. Justice Blackmun's opinion described the "limit on cross-examination" category of cases. *Id.* at 2663. His analysis centered on these cases and led him to the conclusion no confrontation violation occurred. *Id.* at 2664-66.

174. Only a plurality of four Justices, including now retired Justice Powell, agreed the confrontation clause was basically a trial right that did not extend to pretrial discovery. *Ritchie*, 107 S. Ct. at 999.

175. *Stincer*, 107 S. Ct. at 2664. Justice Blackmun has contended that the sixth amendment protects non-trial activities that impact upon a criminal defendant's opportunity to effectively challenge the bias and credibility of an adverse witness at trial. *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring). Justices Brennan and Marshall have also argued that denial of access to outside information impedes a criminal defendant's cross-examination at trial. *Id.* at 1009 (Brennan, J., dissenting).

chambers competency hearing and at that time could not challenge the minor witnesses credibility by cross-examination.[176] Thus, Justice Blackmun's concentration on the "limit on cross-examination" line of cases appeared to provide Stincer with his most legitimate confrontation clause argument.

Justice Blackmun's analysis was correct in placing emphasis on the "limit on cross-examination" category of confrontation clause cases.[177] However, the court should have gone one step further and considered the merits of Stincer's claim in light of Justice Blackmun's concurring opinion in *Pennsylvania v. Ritchie*.[178] In *Ritchie*, Justice Blackmun articulated two sub-categories of the "limit on cross-examination" line of cases.[179] The second sub-group established that a confrontation violation existed when a denial of pretrial information made effective cross-examination, to impeach the credibility and bias of a witness, impossible.[180] If the reasoning of Justice Blackmun's concurrence in *Ritchie* was applied to Stincer's exclusion from the in-chambers competency hearing, his claim would appear even more viable than under the general "limit on cross-examination" analysis actually used by the court.

Justice Blackmun's opinion in *Stincer* made almost no reference to confrontation case law that falls into neither the "out-of-court statement" nor "limit on cross-examination" category of cases,[181] and for good reason. Stincer's claim possessed credibility under the "limit on cross-examination" category of sixth amendment cases, and therefore he could not logically argue that his case fit into neither category. Justice Marshall asserted, in his dissenting opinion, that even if the "limit on cross-examination" line of cases did not apply, Stincer's exclusion from the in-chambers hearing still violated the confrontation clause's "symbolic" goal of fairness.[182] However, precedent fails to support Justice Marshall, because *Delaware v. Fensterer*, which utilized neither the "out-of-court statement" nor the

176. *Stincer*, 107 S. Ct. at 2660.

177. *See* Davis v. Alaska, 415 U.S. 308 (1974). There, the court established that a limitation imposed by either the law or the courts on a criminal defendant's right to cross-examination could violate the confrontation clause.

178. *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

179. *Id.* at 1004.

180. *See supra* note 147 and accompanying text.

181. *Stincer*, 107 S. Ct. at 2664. For an example of a case in neither category, *see* Delaware v. Fensterer, 106 S. Ct. 292 (1985) (*per curiam*).

182. *Stincer*, 107 S. Ct. at 2670.

"limit on cross-examination" categories, concluded that no sixth amendment violation occurred.[183]

Based upon the review of prior case law, Stincer possessed a reasonable claim under the "limit on cross-examination" line of confrontation clause cases. Therefore, the Supreme Court was required by precedent to address the second issue of whether a sixth amendment violation actually resulted when Stincer was excluded from the in-chambers competency hearing. Justice Blackmun's analysis took a general approach to the "limit on cross-examination" category of cases before concluding that Stincer suffered no denial of his rights under the confrontation clause.[184] However, Justice Blackmun would have presented a richer discussion of a criminal defendant's sixth amendment rights if he would have applied his own concurring opinion from *Ritchie* to the *Stincer* case.[185]

In *Ritchie*, Justice Blackmun's concurring opinion expressed concern that when a criminal defendant was denied access to information before trial, his cross-examination of an adverse witness at trial might be ineffective.[186] Therefore, Justice Blackmun divided the "limit on cross-examination" line of cases into two sub-categories.[187] Under his second sub-group, simple questioning at trial not only failed to satisfy a criminal defendant's right to challenge the credibility and bias of adverse witnesses, but also created an impression, in the eyes of the jury, that defense counsel was unnecessarily badgering an apparently innocent witness.[188]

In the case at bar, Stincer was refused access to the comments made by the minor witnesses at the in-chambers competency hearing.[189] If Stincer had participated in the session, he could have not only presented his own questions, but also observed the minor witnesses' responses to the questions challenging their competency. This additional information may have then benefitted Stincer's cross-examination of the witnesses at trial. Also, if Stincer did obtain added information from personally attending the in-chambers hearing, his defense counsel, in the eyes of the jury, might have appeared

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183. Delaware v. Fensterer, 106 S. Ct. at 296 (*per curiam*).

184. *Stincer*, 107 S. Ct. at 2666.

185. *Ritchie*, 107 S. Ct. at 1004-06 (Blackmun, J., concurring).

186. In *Ritchie*, a criminal defendant was denied discovery access to a state agency file that may have assisted the defendant in undermining the testimony of the prosecution's key witness. *Id.* at 994.

187. *Id.* at 1004-05.

188. *See supra* note 147.

189. *Stincer*, 107 S. Ct. at 2660.

more justified in challenging the minor witnesses credibility and bias at trial.

An application of the facts in *Stincer* to Justice Blackmun's concurring opinion in *Ritchie*, appears to lead to the conclusion that Stincer's rights under the confrontation clause were compromised by his exclusion from the competency hearing. However, if Stincer suffered a restriction on his right to cross-examination, he would not be entitled to an automatic reversal of his conviction.[190] Instead, the Supreme Court would remand the case to the Arkansas court for application of the *Chapman* harmless-error analysis.[191] In this manner, Stincer's conviction would stand if the error was harmless, but the Supreme Court's decision would deter any future temptation to use in-chambers hearings to discuss substantive issues of the trial outside the defendant's presence.

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190. *See, e.g., Van Arsdall*, 106 S. Ct. at 1437.

191. *See supra* note 124. The Supreme Court had previously remanded to the state court for a harmless error analysis in *Van Arsdall*, 106 S. Ct. at 1438 and *Ritchie*, 107 S. Ct. at 1002.